Supreme Court, U.S.
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No. 94-1484

In The

Supreme Court of the United States

October Term, 1994

ROBERT W. HARTNAGEL,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's refusal to provide a jury instruction conforming to the standards and burden of proof requirements imposed by Section 105 of The Civil Rights Act of 1991 (42 U.S.C. § 2000e-2(k)(1)(A)(i)) in a sex discrimination suit arising out of circumstances which occurred before November 21, 1991, the effective date of the Act, and tried after that date.

2. Whether the Court of Appeals for the Fifth Circuit erred in affirming the district court's grant of Respondent's motion for judgment as a matter of law with respect to Petitioner's state law breach of employment contract claim on the basis that Petitioner's contract was terminable at will.

3. Whether the Court of Appeals for the Fifth Circuit can be required to issue an opinion in deciding Petitioner's appeal.

LIST OF PARTIES

Petitioner: Robert W. Hartnagel

Respondent: General Motors Corporation

RULE 29.1 LISTING

General Motors Corporation has no parent company. According to its Form 10-K Annual Report for the year ended December 31, 1994, filed with the Securities and Exchange Commission, domestic subsidiaries of General Motors Corporation not wholly owned are the following:

GM Ovonic, L.L.C.
EDS Personal Communications Corporation
Federal Computer Services Corporation
Subarban Limited Liability Company.

For the additional information of the Court a list of all General Motors Corporation subsidiaries, joint ventures and affiliates, both foreign and domestic, updated to April 3, 1995, has been provided to the Clerk of the Court.

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BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's claims were denied by the District Court and that denial was affirmed by the Court of Appeals without the issuance of an opinion by either court. Conformed copies of the Final Judgment in the District Court and the Order of Affirmance in the Court of Appeals are attached as Appendices to the Petition for Writ of Certiorari.

JURISDICTION

The Court of Appeals affirmed the District Court's judgment on September 6, 1994. Petition for Rehearing and a Suggestion for Rehearing En Banc were denied by the Court of Appeals on October 27, 1994. This Court has jurisdiction to review the judgment in this case in the Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction of this matter under 28 U.S.C. § 1291 as an appeal from a final judgment of the District Court. The District Court had jurisdiction to hear the merits of Petitioner's initial age discrimination claim under 29 U.S.C. § 626(c)(1) and to hear Petitioner's breach of contract claim under the doctrine of pendent jurisdiction.

STATUTE INVOLVED

42 U.S.C. § 2000e-2(k) provides in pertinent part the following:

> "(k) **Disparate impact as a basis of practice**
>
> (1)(A) an unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; * * * ."

42 U.S.C. § 2000e(m) provides the following:

> "The term 'demonstrate' means meets the burdens of production and persuasion."

STATEMENT OF THE CASE

(1) Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This action was originally brought by Robert W. Hartnagel ("Hartnagel") on April 29, 1988, against General Motors Corporation ("General Motors") for alleged discrimination on the basis of Hartnagel's age in violation of 29 U.S.C. § 623(a) and for the alleged breach of an employment contract. Hartnagel later amended his complaint to include a claim of sex discrimination in violation of 42 U.S.C. § 2000e-2(a). At the conclusion of all the evidence in the case and before submission of the case to the jury the District Court granted judgment as a matter of law for General Motors on Hartnagel's breach of contract claim.

With regard to Hartnagel's claims of age and sex discrimination, the District Court instructed the jury that it should find for Hartnagel if Hartnagel proved that age or sex was a determining or motivating factor in General Motors' decisions leading to Hartnagel's termination of employment. The jury was further instructed that if General Motors' decisions regarding Hartnagel were made as a matter of business judgment and not because of Hartnagel's age or sex then the jury should find for General Motors, and further, that if Hartnagel presented evidence

of age or sex discrimination and General Motors presented evidence of a non-discriminatory reason for its actions, Hartnagel would have the burden of proving that the reasons offered by General Motors were a pretext. The District Court refused to submit the following jury instruction requested by Hartnagel:

> "Plaintiff claims in this case that Defendant had or has an unlawful employment practice based on disparate impact. An unlawful employment practice based upon disparate impact is established if the plaintiff demonstrates that Defendant uses or used a particular employment practice that causes a disparate impact on the basis of sex. The Defendant then has the burden of proving that the challenged practice is job related for the position in question and consistent with business necessity. Plaintiff need not prove Defendant's discriminatory intent in a disparate impact case. He only needs to show that a facially neutral employment criteria disproportionately disqualifies persons similarly situated to the Plaintiff from employment with the Defendant."

In support of his request Hartnagel relied in part upon Section 105 of The Civil Rights Act of 1991 (the "Act") (42 U.S.C. § 2000e-2(k)(1)(A)(i) (hereinafter "Section 105")). In a verdict returned January 30, 1992, the jury found that Hartnagel did not prove that General Motors discriminated against him because of his age or because of his sex. A final judgment based upon the jury verdict dismissed the entirety of the case with prejudice.

(2) Statement of Facts.

(a) Hartnagel's Employment History.

Hartnagel started work with General Motors in May 1960. In 1975 he was sent to Dallas, Texas, as regional manager of General Motors' public relations office in that city. In 1981 General Motors made a management decision to begin closing regional public relations offices. This led to office closings in Boston, Indianapolis, San Francisco and Southfield, Michigan. In 1984 there was a further restructuring of the entire corporation resulting in closings of public relations regional offices in Jackson, Mississippi, Buffalo, Cleveland, Kansas City and Philadelphia. Plans were developed at the same time to close Dayton, Atlanta and Dallas offices in 1986. As early as 1984 Hartnagel was told of the possibility that the Dallas office would close.

While Hartnagel was in Detroit in the latter part of October 1986, one of his supervisors, Bill Quigley, advised him that the Dallas office would close at the end of the first quarter of 1987. Quigley gave this advance notice to Hartnagel because he was aware of the medical condition of Hartnagel's wife, and felt he owed Hartnagel the courtesy of some advance notice because of his situation. Hartnagel did not challenge the decision to close the Dallas office, and was prepared to support the decision.

At this October meeting Quigley told Hartnagel that he wanted him to come to Detroit for a comparable job as a public relations person for an executive. Alternatively Hartnagel could accept a separation with a cash buyout of one years' severance pay plus six months of medical

insurance coverage. Hartnagel returned to Dallas to discuss the situation with his wife.

Because the operations of the Dallas regional office were being merged into the Chicago regional office, Hartnagel asked Jim Crellin, his immediate supervisor, if he could continue in a regional assignment in the Chicago office. There was, however, a manager already in place in the Chicago office. Hartnagel also talked to Quigley again, but there was no change. He was told basically that the Detroit public relations position was the job Quigley needed someone to do, and Hartnagel was very qualified for the job. Hartnagel then went to Detroit and talked to Jack McNulty, the vice president in charge of public relations for General Motors. He was again advised that plans were firm and there was no way to change. Following the meeting with McNulty, Hartnagel received a letter which confirmed the offer of the position in Detroit comparable in level and salary to his current position.

After meeting with McNulty, Hartnagel returned to Dallas and told his staff of the anticipated closing of the Dallas office. After receiving a phone call from Crellin in Detroit, who was upset that Hartnagel had informed his staff of the Dallas closing, Hartnagel began suffering chest pains. His doctor advised him to go home and rest, following which Hartnagel requested sick leave. During this time Hartnagel prepared letters to General Motors complaining of the treatment he was receiving from the company. He subsequently had several conversations with Jim Berschback, a General Motors personnel staff member assigned to investigate Hartnagel's complaints. In one of those conversations Berschback informed him

that the Detroit job was no longer available. By that point Hartnagel had made it known that he could not accept the job in Detroit, and the job had been filled by another experienced General Motors public relations employee.

Hartnagel stayed on sick leave until March of 1987 during which time he received full compensation and benefits. At that time Berschback called Hartnagel and told him his staff had not yet been able to identify a job for Hartnagel, and that a member of his staff would contact Hartnagel to discuss the situation with him when a position was identified. Nothing happened until August 1987 when Berschback called to say that his staff was still unable to identify a job for Hartnagel and to inquire about Hartnagel's taking a separation package. During this time Hartnagel was continuing to draw his full salary and benefits.

In October 1987 Bill Quigley called with the offer of a new job in Warren, Michigan, a Detroit suburb, in a news relations position. This offer was at Hartnagel's present salary and would include all relocation expenses. An alternative offer was for a separation package involving a twenty-month severance payment ($100,000) plus six months of continued medical insurance.

Hartnagel went to Detroit about this position and while there visited with Helen Moye, another member of General Motors' personnel staff. Hartnagel told Moye what he really wanted was to stay in Texas to be with his wife, and that it would be devastating for him and his wife if he had to come to Detroit. What he needed was money to live on and medical benefits. At the end of their conversation it was agreed that he would go back to

Texas and wait for a call from her to try to give him what he wanted. Conversations continued through December and into January of 1988 when Hartnagel was placed on a "special assignment" for a period of six months in Dallas starting on January 1, 1988, during which he would get full pay and full benefits. He would then be laid off for two years, at seventy-five percent pay for the first six months and at sixty percent of his pay for the last eighteen months, along with full benefits for the entire period. The purpose of this arrangement was to provide a bridge to "thirty and out" (an option for retirement available after thirty years of service at General Motors).

Hartnagel's layoff status continued until April of 1990 when General Motors offered him still another position as a manager in the stockholder relations department, or alternatively, another retirement package. Hartnagel's initial response to this offer was to seek from the district court an injunction enjoining General Motors from extending the offer. After a hearing, however, Hartnagel withdrew his motion and accepted the position in Detroit.

Hartnagel worked in the stockholder relations department through the remainder of 1990 and into 1991. After Christmas of 1990, however, he told his supervisor, Dale Cooper, that he would have to continue on a part-time basis from that point on because he had personal problems at home in Dallas related to his wife's illness. He would work for a two week period and then would be gone for two weeks. Hartnagel initially used his vacation for this purpose, but ran out of vacation in April of 1991. He then sent Dale Cooper a memo advising her of his forecasted personal absences from that date forward

through June. This prompted a memo from the business manager of the public relations staff advising Hartnagel that any days in excess of his vacation days would be treated as personal leave days under General Motors' dependent care leave program, which would mean an absence without pay. Hartnagel would not agree to this arrangement and on May 6, 1991, sent his own memo to the business manager advising of his view that unpaid leaves of absence without Hartnagel's consent constituted a breach of contract and termination of his employment. He accordingly advised of his intent to begin drawing retirement benefits commencing July 1, 1991, further advising that his actions should not be taken as voluntary.

As of July 1, 1991, Hartnagel ceased to be on the General Motors' payroll.

(b) Hartnagel's Sex Discrimination Claim.

In support of his disparate treatment sex discrimination claim Hartnagel testified about statistical results of his study of employment information provided to him by General Motors in the course of this litigation. The gist of Hartnagel's study was that the percentage of females in the General Motors public relations staff increased in the years 1986 through 1989, that the percentage of females working in public relations for General Motors was over twice the percentage of females in General Motor's total work force, and that in the years 1986 through 1988 more males separated from the public relations staff than females.

Hartnagel offered no evidence isolating or identifying any specific General Motors employment practice alleged to be responsible for any observed statistical disparities. Rather, the only "employment practice" of which Hartnagel complained was his personal experience of not being offered the Chicago job he wanted, and only being offered jobs in Detroit which he felt he could not take and which he felt were designed to cause him to retire.

When asked what his statistical evidence had to do with his situation, Hartnagel responded, "It had to do with the fact that I am gone and they are there. I was offered jobs that were impossible for me to do and they were offered jobs that they could do. And that's the difference. The effect of the job that I was offered under my circumstances was to force me to accept separation." While Hartnagel claimed to have knowledge about the flow of applicants for positions with General Motors and the qualifications of applicants he offered no testimony in that regard.

(c) Hartnagel's Contract.

Hartnagel's Employment Agreement with General Motors provided in pertinent part the following:

> "1. The Employee agrees to devote his time and service in the employ of the Employer in such capacity as the Employer may direct.
>
> "2. The Employee acknowledges that his employment under this agreement is from month to month only on a calendar month basis.
>
> "3. In consideration of the services to be performed by the Employee for the Employer, in

> any and every capacity, the Employer agrees to pay the Employee, . . . , compensation at the monthly rate set forth on the 'Compensation Statement'. . . .
>
> * * *
>
> "5. The Employer and the Employee acknowledge that there are no other arrangements, agreements, or understandings, verbal or in writing, regarding same and that any modification or amendment hereof, other than a cancellation and replacement hereof by another written form of agreement, must be endorsed hereon in writing and initialed by both the Employee and the Employer."

Hartnagel claims a contractual obligation also arose out of a General Motors brochure entitled "A Renewed Commitment" apparently distributed to the public relations staff central office in 1982. The brochure stated in the part upon which Hartnagel relies, "Specifically, length of service now will be the primary consideration in any reduction involving employees with five or more years' length of service." Hartnagel also claims contractual obligations arose out of a 1982 five-page memorandum on the subject "Communications Brochure – Salaried Employee" distributed to regional managers which included the statement, "The commitment to improved job security applies to all salaried employes – including the Corporation's most senior and valued executive group."

(d) Disposition of Hartnagel's Claims.

At the conclusion of all evidence the district court granted General Motors' motion for judgment as a matter of law on Hartnagel's contract claims grounded upon the premise that the employment contract was terminable at will. The jury then found that Hartnagel did not prove that General Motors discriminated against him by constructively discharging him because of his age or because of his sex, and a final judgment was entered dismissing the entirety of the case with prejudice. That judgment was affirmed by the Court of Appeals without opinion.

REASONS FOR DENYING THE WRIT

This writ should be denied because there are no "special and important reasons" for granting. Sup. Ct. R. 10.1. The Court of Appeals' affirmance without opinion of the District Court's denial of Hartnagel's claims presents no conflict with any decision of another court of appeals or of this Court, either apparent or implied. To the contrary, with respect to the only arguably significant federal issue in this case, the application of Section 105 of The Civil Rights Act of 1991 to this case, the District Court's refusal to apply Section 105 and the Court of Appeals' affirmance of the District Court's judgment, is entirely consistent with the guidelines established by *Landgraf v. U.S.I. Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994).

The disposition of Hartnagel's breach of employment contract claim is likewise fully consistent with applicable Texas law regarding "at-will" employment agreements and with federal court application of that law.

As a further observation, the issue of application of Section 105 to this case is not one essential to its resolution. For the jury to have found for Hartnagel, it was necessary for him to have established, first, that he was constructively discharged, and second, a prima facie case of discrimination. He did neither. The evidence affirmatively shows that Hartnagel voluntarily terminated his employment notwithstanding extensive effort by General Motors to retain him as an employee. The evidence fails to establish prima facie discrimination.

Notwithstanding the change in burden of proof and the reinstitution of the concept of business necessity brought about by Section 105, the initial burden remains on a plaintiff claiming disparate impact sex discrimination to prove that a specific employment practice operates more harshly on one sex than another. A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656, 109 S. Ct. 2115, 2124 (1989) (citing and quoting *Watson v. Fort Worth Bank and Trust*, 490 U.S. 977, 994, 108 S. Ct. 2777, 2789 (1988)). Hartnagel's testimony regarding his own personal experience did nothing to isolate and identify any specific employment practices or any causal connection between an employment practice and any statistical disparity in General Motors' work force. Under these circumstances,

where no prima facie case of disparate treatment is established, it is unnecessary to reach the issue of the application of Section 105. *See, Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1641 (1994); *Torre v. Federated Mut. Ins. Co.*, 854 F. Supp. 790, 809 n.15 (D. Kan. 1994).

Nor do the issues raised by the Petition, assuming they are necessarily presented by the record in this case, warrant this Court's plenary attention.

1. Section 105 of The Civil Rights Act of 1991 Is Not Applicable to Claims Arising Out of Circumstances Occurring Before Passage of the Act.

Both *Landgraf v. U.S.I. Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994), considered the retroactive effect of particular sections of The Civil Rights Act of 1991 in the context of cases pending in their respective courts of appeal at the time of passage of the Act. In both cases the conduct of each of the defendants upon which the claims against them were based occurred prior to passage of the Act. *Landgraf* addressed those parts of Section 102 of the Act, Pub. L. 102-166, 105 Stat. 1071, creating a right to recover compensatory and punitive damages for certain violations of Title VII of The Civil Rights Act of 1964 (codified at 42 U.S.C. § 1981a(b)), and providing for a trial by jury when such damages are sought (codified at 42 U.S.C. § 1981a(c)). *Rivers* focused on the application of Section 101 of the Act (codified at 42 U.S.C. § 1981(b)) defining the term "make and enforce

contracts" as used in Section 1 of The Civil Rights of Act of 1866 (codified at 42 U.S.C. § 1981(a)). In each case the courts of appeals' decisions declining to apply the respective provisions of the Act to events pre-dating passage of the Act were upheld. Notwithstanding the slightly different procedural context of the present case and that a different section of the Act is under consideration, the analysis in *Landgraf* and *Rivers* compels the conclusion that Section 105 of the Act is not applicable to Hartnagel's claim.

Landgraf resolves two general issues regarding retroactivity of the Act and reaffirms the general presumption against application of statutes to conduct pre-dating enactment of a statute.

First, the notion that anything in the text of the Act (with the exception of two minor provisions not applicable to *Landgraf*, *Rivers* or the present case) provides any indication of Congress' intent with respect to the retrospective or prospective reach of various provisions of the Act was rejected. *Landgraf* at 1493-95. Second, the absence of any meaningful legislative history of the Act was confirmed. *Id.* at 1495-96. Third, the Court has eliminated the "apparent tension," *Kaiser Aluminum Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570 (1990), between the long-standing principle that "retroactivity is not favored in the law," as a consequence of which "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988), and pronouncements that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result

in a manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016 (1974). That has been accomplished by a reaffirmation of "the presumption against retroactive legislation [which] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic," 114 S. Ct. at 1497, and recognition that the Court has "declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." *Id.* at 1499. As this Court observed:

> "But while the *constitutional* impediments to retroactive civil legislation are now modest, prospectivity remain s the appropriate default rule."

114 S. Ct. at 1501 (emphasis in the original).

Under the Court's analysis, however, a determination that no clear expression of congressional intent exists in favor of retroactivity does not end the inquiry because,

> "The statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct anti-dating the statute's enactment [citation omitted]. Rather the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."

114 S. Ct. at 1499. The discussion of retroactivity was summarized in the following:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no

> need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear Congressional intent favoring such a result."

114 S. Ct. at 1505.

The present case involves Section 105 of the Act, particularly that portion of the section codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) previously quoted. As this Court has observed, The Civil Rights Act of 1991 is largely a response to a series of Supreme Court decisions interpreting The Civil Rights Act of 1866 and The Civil Rights Act of 1964. Of apparent particular concern to Congress was the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989), specifically mentioned in both Sections 2(2) and 3(2) of the Act. Section 105 is in direct response to *Wards Cove. Landgraf*, 114 S. Ct. at 1489.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971), this Court made clear that a neutral employment practice which operates to exclude minorities is nevertheless unlawful unless it serves a valid business purpose. "The touchstone is business necessity." 401 U.S. at 431, 91 S. Ct. at 853. Following *Griggs*, a number of federal decisions appeared to establish that in a disparate impact case involving a facially neutral employment practice if an

employee could demonstrate a *prima facie* case of unlawful discrimination, it was the burden of the employer to present and prove as an affirmative defense a business necessity for the practice in question. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 668 n.14, 109 S. Ct. 2115, 2131 n.14 (Stephens, J., dissenting).

In *Wards Cove*, however, it was held that if the plaintiff made out a *prima facie* case of disparate impact, the employer's burden would be to produce evidence of a business justification for the challenged employment practice. The Court observed that the justification could not be insubstantial; on the other hand, the challenged practice did not have to be "essential" or "indispensable" to the employer's business. The Court further observed that while it was the employer's burden to produce evidence of a business justification for his employment practice, the burden of persuasion would remain with the plaintiff. 490 U.S. at 657-59, 109 S. Ct. at 2125-26.

Section 105 clearly responds to *Wards Cove* and overrides it. Whether *Wards Cove* or Section 105 provides the rule applicable to this present case depends upon the answer to two questions. Is there any clear expression of congressional intent that Section 105 applies to events pre-dating passage of the Act? Would application of Section 105 to this case result in a retroactive application impermissible in the absence of a clear expression of congressional intent? The answer to the first question is no; the answer to the second is yes. Consequently, the statute does not apply.

As previously noted, in *Landgraf* this Court found no expression of congressional intent that the Act or any

section of it be applied retroactively. The *Landgraf* petitioners argued that such an expression is found in Section 402(a) of the Act (codified at 42 U.S.C. § 1981 note) which provides, "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The argument was made that two provisions of the Act required prospective application in two specific circumstances, suggesting the conclusion that in all other circumstances the Act would apply retrospectively. This Court rejected that contention, believing that Congress would have chosen a more direct means of expressing any intent that the Act applied retrospectively. 114 S. Ct. at 1495.

This holding is emphasized here because one of the circumstances in which Congress has mandated that the Act apply only prospectively is to the parties in the *Wards Cove* case. Section 402(b) of the Act (codified at 42 U.S.C. § 1981 note). A specific exception for the *Wards Cove* parties does not support an inference that the Act is to be applied retrospectively in all other disparate impact cases. As this Court observed, this would be a surprisingly indirect means of conveying such an important message. A more likely explanation is that precedent on the retroactivity issue left doubts about what rules would apply in the absence of congressional guidance. Given that doubt, Congress did not want to leave to the courts the issue of whether the Act should or should not apply to the *Wards Cove* parties, and expressly provided it would not.[1] 114 S. Ct. 1495.

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[1] Likewise, Congress did not want to leave to the courts the issue of whether the Act would apply retrospectively to

In the absence of a clear expression of congressional intent that a statute operate retroactively, the inquiry is whether application of the statute in a particular case would have a retroactive effect. If it would, it should not be applied. *Landgraf, supra,* at 1505. Comparing the effect of Section 105 to Sections 101 and 102 considered in *Rivers* and *Landgraf,* respectively, confirms that use of Section 105 in the present case would be an impermissible retroactive application.

First, with respect to the burden of proof issue, *Landgraf* eliminates any notion that the burden of proof requirement incorporated in Section 105 should be given effect simply because it is a procedural matter. In *Landgraf,* it was observed that while the creation of a right to a jury trial might be considered a purely procedural matter applicable to trials taking place after the effective date of the statute, the jury trial provisions of Section 102 of the Act applied only to cases in which the complaining party sought the compensatory or punitive damages newly authorized by the same section. As a consequence, application of the jury trial option had to stand or fall with the damage provisions under consideration. 114 S. Ct. at 1505. Here, the statutory placement of the burden of proof in disparate impact cases is inextricably intertwined with Section 105 and its reordering of the elements of a disparate impact case. Application of that part of Section 105 (and Section 104) placing a burden of proof on the defendant must stand or fall with the remainder of Section 105.

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overseas employers, expressly providing that it would not. Section 109(c) of the Act (codified at 42 U.S.C. § 2000e, note).

Application of the "business necessity" standard imposed by Section 105 would be a clear retroactive application of the Act. Under Section 105, the burden now falls on the employer to demonstrate not just business justification for a challenged practice, but that the challenged practice is job related for the position in question and is consistent with business necessity. Under the statute, there is an obvious expansion of the definition of the type of conduct which could support a discrimination claim, that being conduct which, although justifiable as a business practice, is not essential or necessary to the employer's business. This has the effect of adding new legal consequences to past conduct, an effect which *Landgraf* clearly characterizes as retroactive. 114 S. Ct. at 1506-07. *See, Matthews v. Runyon*, 860 F. Supp. 1347, 1354, 1355 (E.D. Wis. 1994).

The retroactive effect of application of Section 105 to pre-enactment conduct is even more forcibly illustrated by *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994), in which the Court considered application of Section 101 of the Act, in which Congress extended liability under 42 U.S.C. § 1981 to embrace all aspects of a contractual relationship, including contract terminations. The Court found this to be an even more clear example of retroactivity because of the expansion of the definition of conduct for which there could be liability under 42 U.S.C. § 1981, not just an expansion of the damage exposure brought about by Section 102. 114 S. Ct. at 1515. As noted above, Section 105 expands the liability of an employer to include those forms of conduct for which a business justification exists but for which there is no business necessity.

Rivers also directly addresses, and refutes, the primary argument advanced by Hartnagel in support of his contention that Section 105 should be applied retroactively. Specifically, the main thrust of Hartnagel's argument is that Section 105 should be applied in this case because it "restores" the law pertaining to disparate impact claims to the form in which it existed prior to the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989). Hartnagel argues that because of the clearly expressed intent of Congress to overrule that decision, that decision should no longer apply, not even to conduct which pre-dated enactment of the "overruling" legislation. (Petition 17-29).

The petitioners in *Rivers* advanced the same argument, contending that Section 101 of the Act should apply in their case because it was "restorative" of the understanding of 42 U.S.C. § 1981 which prevailed before the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). The *Rivers* petitioners argued first that Congress' purpose of "restoring" pre-*Patterson* law indicated an affirmative intent that Section 101 be applied to cases arising before its enactment. They further argued that there exists a "presumption in favor of application of restorative statutes" to cases arising before their enactment. 114 S. Ct. at 1515. The *Rivers* petitioners also argued, as could be argued in this case, that where a new statute simply enacts a rule which the parties could have believed to be the law when they acted, the concerns of unfairness relating to retroactivity do not exist. 114 S. Ct. at 1517.

This Court rejected those contentions, concluding that the fact that Section 101 was enacted in response to

Patterson did not supply sufficient evidence of a clear congressional intent to overcome the presumption against statutory retroactivity. 114 S. Ct. at 1517. It further concluded that its prior decisions simply did not support the proposition that the Court had espoused a "presumption" in favor of retroactive application of restorative statutes. 114 S. Ct. at 1518. "A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but we do not 'presume' an intent to act retroactively in such cases. We still require clear evidence of intent to impose the restorative statute 'retroactively.'" *Id.*

Here, there is no clear expression of congressional intent which would support the application of Section 105 to supplant *Wards Cove* as the law applicable to any Title VII disparate impact claim in this case.

In summary, no provision of The Civil Rights Act of 1991 indicates that Congress intended for any particular provision of the Act to be applied to claims arising out of events which occurred prior to its enactment. In the absence of any clear expressions of congressional intent, the presumption is that statutes will not be applied to have retroactive effect, even when the legislation supplants a judicial decision. Because Section 105 of the Act expands liability for conduct occurring prior to passage of the Act, its application to this case would have an impermissible retroactive effect. Accordingly, the district court acted correctly in declining to submit an instruction premised upon the business necessity and burden of proof provisions of Section 105 of the Act.

2. Hartnagel's State Law Breach of Employment Contract Claim Was Properly Denied.

Texas contracts providing for employment at will are terminable at any time by either party, with or without cause, absent an express agreement to the contrary. *Federal Express v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1983); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). In an action for wrongful discharge an employee must prove that he and his employer had a contract that specifically limited the employer's right to terminate the employment contract at will. *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.). Federal decisions adhere to the Texas position that there can be no claim for breach of an employment contract unless specific express provisions limit the employer's right to terminate the contract at any time for any reason. *Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992); *Crum v. American Airlines, Inc.*, 946 F.2d 423 (5th Cir. 1991); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 591 (1991).

Hartnagel's month-to-month employment contract with General Motors contained no provisions which specifically, expressly or otherwise limited the right of either party to terminate the employment agreement. Characterization of Hartnagel's contract as "at will" is confirmed by decisions under Michigan law denying claims of wrongful termination of the identical contract. *Taylor v. General Motors Corp.*, 826 F.2d 452 (6th Cir. 1987); *Richards*

v. General Motors Corp., 991 F.2d 1227, 1234 (6th Cir. 1993). The general rule in Michigan, as in Texas, is that in the absence of an agreement otherwise, an employee for an indefinite term is terminable at will.

Hartnagel further argues, however, that additional rights were conferred upon him by the communications from General Motors described previously. Under Texas law these communications by General Motors to its employees did not modify or supplement Hartnagel's employment contract. The brochure and memorandum upon which Hartnagel relies are comparable to handbooks and other policy statements which Texas courts have consistently held not to modify or otherwise limit a contract terminable at will. *Day & Zimmermann, Inc. v. Hatridge*, 831 S.W.2d 65, 69 (Tex. App. – Texarkana 1992, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App. – Corpus Christi 1982, no writ). *See, Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 591 (1991).

Hartnagel's employment contract with General Motors was a contract terminable at will which obligated Hartnagel to devote his time and service to General Motors in such capacity as General Motors might direct. No breach of the contract resulted either from General Motors' inability to satisfy Hartnagel's employment demands or from Hartnagel's ultimate departure and retirement from employment.

3. The Court of Appeals Was Not Required to Issue an Opinion.

Rule 36, F.R.A.P., contemplates that the judgment of an appellate court may be rendered without an opinion. There is no requirement, constitutional or otherwise, that a federal appellate court issue a written opinion. *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983); *United States v. Baynes*, 548 F.2d 481, 483 (3d Cir. 1977). The Court of Appeals for the Fifth Circuit adopted a local rule formally authorizing affirmance or enforcement of an order without opinion more than twenty years ago. *National Labor Relations Board v. Amalgamated Clothing Workers of America*, 430 F.2d 966, 968 (5th Cir. 1970). This Court has approved that procedure (at least in the case of affirmances). *Taylor v. McKeithen*, 407 U.S. 191, 194, 92 S. Ct. 1980, 1982 n.4 (1972). The absence of an opinion in this case does not require this Court's review.

CONCLUSION

Section 105 of the Civil Rights Act of 1991 does not apply in this case. Hartnagel's claim for wrongful termination of an "at-will" employment contract was properly denied. The Fifth Circuit was not required to issue an opinion. The Petition should be denied.

Respectfully submitted,

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